No. 86-322 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners,

v.

J.T. GIBBONS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that, in the absence of statutory authority, district courts may not award witness fees under 28 U.S.C. § 1920 in violation of the restrictions of 28 U.S.C. § 1821?

PARTIES TO THE PROCEEDINGS

The Petition for Certiorari contains an accurate description of the parties to the proceedings.

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STATEMENT OF THE CASE

Plaintiff/Respondent J.T. Gibbons is a distributor of pipe fittings for oil rigs. Defendants/Petitioners are the company that manufactures those fittings (Crawford Fitting Company), Crawford's owner (Fred A. Lennon), two companies that distribute the fittings (Capital Valve & Fitting Company, Inc. and Thomas Read & Company), and Capital's owner (Robert D. Jennings).

In 1977, Gibbons began selling Crawford fittings, which it acquired through Capital and sold in Scotland. Gib-

bons' sales competed with sales made by Crawford distributors in Scotland. In 1978, Capital refused to sell any more products to Gibbons. When Gibbons approached Read, Read also refused to deal. After unsuccessful negotiations, Gibbons brought suit against petitioners for breaches of federal antitrust laws. *See J.T. Gibbons, Inc. v. Crawford Fitting Company*, 704 F.2d 787, 789-90 (5th Cir. 1983).

The suit alleged violations of 15 U.S.C. §§ 1 and 2. It claimed that: (1) defendants' refusal to deal constituted an unreasonable restraint of trade; (2) all defendants conspired to eliminate Gibbons' competition in the North Sea market; (3) Crawford set resale prices for its distributors; and (4) Crawford's subsidiary and manufacturing companies engaged in horizontal price fixing. *J.T. Gibbons, supra*, 704 F.2d at 790. Petitioners counterclaimed for malicious prosecution. *Id.*

At the close of trial, the trial court directed a verdict against J.T. Gibbons on its antitrust claims. Petitioners' claim of malicious prosecution was allowed to go to the jury, which returned a verdict finding that Gibbons' suit was not malicious prosecution. *See J.T. Gibbons, Inc. v. Crawford Fitting Company*, 565 F. Supp. 167 (E.D. La. 1981).

On appeal to a panel of the Fifth Circuit, the Court of Appeals affirmed the directed verdict on the antitrust claims, assuming that violations had occurred but finding that Gibbons had failed to prove damages. *See* 704 F.2d at 792 ("we have assumed for purposes of this discussion, that the defendants did in fact conspire to eliminate Gibbons' competition."). It also affirmed the jury's verdict denying the malicious prosecution claim. *Id.* at 799.

Following the affirmance, petitioners presented a bill of costs to the district court, including a claim for expert witness fees in excess of those allowed by the applicable statute (28 U.S. § 1821). The district court awarded the

requested costs, including all of the requested expert witness fees. *J.T. Gibbons, Inc. v. Crawford Fitting*, 102 F.R.D. 73 (E.D. La. 1984). Petn at 13a-45a.

On appeal, the issue presented was whether, in the absence of statutory authorization, a district court can award as "costs" expert witness fees. The Court of Appeals followed the rule established in *Henkel v. Chicago, S.P., Minn. & O. Ry. Co.*, 284 U.S. 444 (1932), where this Court held:

> Under [the predecessor statute to 28 U.S.C. § 1821] additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed in cases in the federal courts.
>
> . . .
>
> The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses.

Henkel, 284 U.S. at 446, 447.

The Court of Appeals remanded with instructions to recalculate the witness fees in accord with 28 U.S.C. § 1821. *J.T. Gibbons v. Crawford Fitting Company*, 760 F.2d 613 (5th Cir. 1985). Petn at 5a-12a. A petition for certiorari was filed by Crawford et al., *Crawford Fitting Company v. J.T. Gibbons, Inc.*, Supreme Court No. 85-248, but the Fifth Circuit subsequently sua sponte granted rehearing *en banc* and the petition was dismissed pursuant to Rule 53. *Crawford Fitting v. J.T. Gibbons, Inc.*, —— U.S. ——, 106 S. Ct. 212, 88 L.Ed.2d 182 (1985).

On rehearing *en banc*, the *en banc* court reached the same result, holding that district courts may not violate the restrictions of 28 U.S.C. § 1821 in awarding expert witness fees under 28 U.S.C. § 1920. *J.T. Gibbons v. Crawford Fitting Company*, 790 F.2d 1193 (5th Cir. (1986) (*en banc*). Petn at 1a-4a.

This petition followed.

SUMMARY OF ARGUMENT

The issue here is whether, in the absence of statutory authority, a party may recover expert witness fees in excess of those provided in 28 U.S.C. § 1821. The law on this issue is clear. No such fees are recoverable. This Court stated the law in *Henkel*, reaffirmed the underlying principle in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and the rule has been steadily followed. Further, Congress had as least twice within the last ten years reaffirmed its understanding that specific congressional authority is required to allow district courts to tax expert witness fees as costs. Part I *infra*.

The "split" identified by petitioners is not significant. Three of the allegedly "conflicting" circuits do not in fact conflict with the rule in *Henkel* or with this case. Only the Third and Eighth Circuits arguably have a conflicting rule. Even within those circuits, the "split" is not significant. A search of district court and court of appeals cases reveals only eight reported cases in the last ten years in which the position of the Third and Eighth Circuits has resulted in a final judgment taxing expert witness fees. Part II *infra*.

The alleged importance of the split is further diminished by the fact that any knowledgeable counsel wishing to recover expert witness fees will seek prior court approval of the expenditures pursuant to Civil Rule 706, thus obtaining explicit statutory authority to tax the expert's fees as costs pursuant to 28 U.S.C. § 1920(6). This basic bit of planning should prevent the issues in the split from ever arising. Part III *infra*.

Petitioners' attempts to justify certiorari under the rubric of public policy must be rejected in light of this Court's decisions, Congressional enactments, and the public policies expressed therein. Part IV *infra*.

ARGUMENT

I. SETTLED LAW PROVIDES THAT EXPERT WITNESS FEES MAY NOT BE TAXED BEYOND THOSE FEES AUTHORIZED BY STATUTE

Federal Rule of Civil Procedure 54(d) provides that costs shall be awarded "as of course to the prevailing party, unless the court otherwise directs." Congress has provided, in 28 U.S.C. § 1920(3), that taxable costs may include "fees and disbursements for printing and witnesses." The amount of taxable witness fees is then set by 28 U.S.C. § 1821, which provides:

> Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.

The remainder of § 1821 specifies the daily fee that may be paid, and the manner in which travel and lodging expenses must be computed.

In *Henkel v. Chicago, St. Paul, Minn. & Omaha Ry. Co.*, 284 U.S. 444 (1932), this Court considered whether a federal district court could avoid the statutory amount limits of § 1821 in award expert witness fees. This Court held it could not:

> The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses.

Henkel, supra, 284 U.S. at 447. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), reaffirmed a similar rule with respect to attorney fees—statutory authorizations (or equitable exceptions not at issue here) are required or the fees may not be awarded.

Thus, absent other statutory authorization, the fees of all witnesses, including expert witnesses, are limited to those set forth in § 1821. *Accord, e.g., Kivi v. Nationwide Mut. Ins. Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983);

In re Air Crash, 687 F.2d 626, 631 (2d Cir. 1982); *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066-67 (D.C. Cir. 1981); *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 865 (7th Cir. 1981); *Bosse v. Litton Unit Handling Systems*, 646 F.2d 689, 695 (1st Cir. 1981); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, (1980); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 624 (4th Cir. 1978); *Ott v. Speedwriting* Publishing Co., 518 F.2d 1143, 1149 (6th Cir. 1975); *Twentieth Century Fox v. Goldwin*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

Over the years, Congress has repeatedly affirmed its understanding that specific congressional enactment in addition to § 1821 is required to allow the taxation of expert witness fees. Thus, for example, the Equal Justice Act, 28 U.S.C. §§ 2401 et seq., provides that in suits against the United States: "a judgment for c[illegible], as enumerated in section 1920 of this title" may be [illegible] against the United States. In so providing, however, Congress clearly understood and relied on the fact that § 1920 costs do *not* include private expert witness fees in excess of the amount set forth in § 1821. Addressing such fees, Congress in 1980 adopted an amendment to § 2412 providing that for a trial period of four years, a party prevailing against the United States could recover "*in addition to*" the costs enumerated in § 1920 "fees and other expenses . . . [including] the reasonable expenses of expert witnesses." 28 U.S.C. § 2412(d)(1)(A) and (d)(2)(A), P.L. 96-481 (1980). Congress thus reemphasized its intent that authorization in addition to 28 U.S.C. §§ 1920 and 1821 is required before private expert witness expenses may be taxed.

Similarly, in 1978, Congress again confirmed that expert witness fees are not generally taxable when it created a new subsection to 28 U.S.C. § 1920 authorizing taxation of costs for "compensation of court appointed experts." 28 U.S.C. § 1920(6). If expert witness fees were generally taxable, this amendment would not have been necessary. *See State of Illinois v. Sangamo Construction Co., supra*, 657 F.2d at 865.

II. THE LONG-STANDING RULE HAS NOT BEEN SERIOUSLY AFFECTED BY THE POSITION OF THE THIRD AND EIGHTH CIRCUITS

In their original petition for certiorari, filed under Supreme Court No. 85-248 and dismissed under Rule 53, petitioners argued only that the Third and Eighth Circuits had rules contrary to the decision here. Notwithstanding an attempt to create a different impression now, that continues to be correct—only two circuits deviate from *Henkel*.

The First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits all follow *Henkel*.[1] Petitioners attempt to create a different impression by quoting from the *en banc* dissent. *See*

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[1] *See, e.g.*, in order according to circuit, *Bosse v. Litton Unit Handling Systems*, 646 F.2d 689, 695 (1st Cir. 1981); *Templeman v. Chris Craft Corporation*, 770 F.2d 245, 250 (1st Cir.), *cert. denied*, —— U.S. ——, 106 S. Ct. 571, 88 L.Ed.2d 556 (1985); *In re Air Crash*, 687 F.2d 626, 631 (2d Cir. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 624 (4th Cir. 1978); *Specialty Equipment & Mach. Corp. v. Zell Motor Car Co.*, 193 F.2d 515, 521 (4th Cir. 1952); *J.T. Gibbons v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 865 (7th Cir. 1981); *Twentieth Century Fox v. Goldwin*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Kivi v. Nationwide Mut. Ins. Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1526 (11th Cir. 1985); *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066-67 (D.C. Cir. 1981).

Petn at 6-8. The cases cited by the dissent, however, do not create the alleged conflict.

The First Circuit cases cited by the dissent hold merely that prior court approval can authorize taxing of fees (conceded under every rule),[2] or that although the rules on "obstinacy" might allow an award of expert witness fees, the district court did not abuse its discretion in refusing to do so.[3] None of the cases purports to overrule *Bosse v. Litton Unit Handling Systems*, 646 F.2d 689 (1st Cir. 1981), which holds that expert witness fees cannot exceed those specified in 28 U.S.C. § 1821.

Of the two Sixth Circuit cases purportedly creating a conflict, one was a "common fund" attorneys fee case that does not address expert witness fees,[4] and the other simply stated that "the standards for awarding such costs are well settled and need not be repeated here."[5] Neither case purports to challenge the well-settled Sixth Circuit rule that expert witness fees are not taxable under 28 U.S.C. § 1920 in excess of the amounts set forth in 28 U.S.C. § 1821. *See Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975). Nor have these cases in any way suggested to the district courts that *Henkel* has been abandoned by the Sixth Circuit. *See, e.g., Grider v. Kentucky & Indiana Terminal R. Co.*, 101 F.R.D. 311, 312 (W.D. Ky. 1984); *Mastrapas v. New York Life Ins. Co.*, 93 F.R.D. 401, 407 (E.D. Mich. 1982).

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[2] *Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274-75 (1st Cir. 1982); *Templeman v. Chris Craft Corporation*, 770 F.2d 245, 250 (1st Cir.), *cert. denied*, —— U.S. ——, 106 S. Ct. 571, 88 L.Ed.2d 556 (1985).

[3] *Heddinger v. Ashford Memorial Community Hospital*, 734 F.2d 81, 86 (1st Cir. 1984).

[4] *Smillie Park Chemical Co.*, 710 F.2d 271 (6th Cir. 1983).

[5] *Northcross v. Board of Ed.*, 611 F.2d 614, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

In the Ninth Circuit, one cited case contains dicta on the potential to award costs with prior court approval and in exceptional circumstances,[6] and the other, a 42 U.S.C. § 1988 case, talks about discretion to award fees,[7] but neither case remotely suggests that it is overruling the settled rule of *Twentieth Century Fox v. Goldwin*, 328 F.2d 190, 224 (9th Cir. 1964) that expert witness fees in non-civil rights cases, in particular in antitrust cases, are limited to those set forth in 28 U.S.C. § 1821.

In short, petitioners were correct the first time. The only potential conflict is with panel decisions in the Third and Eighth Circuits. As a practical matter, that "split" simply is not of a magnitude sufficient under any circumstances to justify certiorari.

An analysis of the importance or lack of importance of the "split" must begin with a definition of the situations affected by the "split." A large number of the reported cases discussing expert witness fees involve specific statutory provisions separate from 28 U.S.C. § 1920(3) and § 1821, such as the Civil Rights Fees Act, 42 U.S.C. § 1988, *see, e.g., Heiar v. Crawford County*, 746 F.2d 1190, 1203-04 (7th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 3500, 87 L.Ed.2d 631 (1985); *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983), or the Equal Justice Act, 28 U.S.C. § 2412, *see United States v. 341.45 Acres of Land*, 751 F.2d 924 (8th Cir. 1984). Cases holding that expert witness fees may or not be awarded under the Civil Rights Fees Act or the Equal Justice Act are not relevant to or affected by the "split" that petitioners seke to have reviewed.

This case does not address awards of fees under any statute specifically authorizing such awards. The only

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[6] *Shakey's Inc. v. Covalt*, 704 F.2d 426, 437 (9th Cir. 1983).

[7] *Thornberry v. Delta Airlines, Inc.*, 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952, *on remand*, 709 F.2d 524 (9th Cir. 1983).

issue here is whether expert witness fees may be awarded in the *absence* of specific statutory authorization.[8]

A search of the district court and court of appeals cases in the Third and Eighth Circuits over the last ten years shows that the practical effect of the split presented here is *de minimis*. Actual awards of expert witness fees by the courts of the Third and Eighth Circuits in the absence of statutory authority are so rare as to be insignificant. The first case creating the split is *Welsh v. Likins*, 68 F.R.D. 589 (D. Minn.), *aff'd*, 525 F.2d 987 (8th Cir. 1975). In the ten years since that decision, respondent can find only eight cases (one of which was

[8] This case's companion case on *en banc* review, *International Woodworkers of America v. Champion International Corporation*, 790 F.2d 1174 (5th Cir. 1986) (*en banc*), *cert. pending* No. 86-328, similarly presents only the 28 U.S.C. § 1821 question presented by *Crawford Fitting*, although it also discusses the authorizations of 42 U.S.C. § 1988 in dicta. In *International Woodworkers*, a successful civil rights defendant failed to meet the requirements of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), for recovery of fees under 42 U.S.C. § 1988. *See* Petn in *Crawford Fitting* at 48a. Champion failed to appeal the determination that it had not met the *Christiansburg* requirements. *Id.* The only issue before the *en banc* court was whether Champion was entitled to expert witness fees under 28 U.S.C. §§ 1920 and 1821—the same issue presented here. Thus, the Question Presented in the *International Woodworkers* Petition for Certiorari is the same as the Question Presented here, *see International Woodworkers* Petn at p. i, and that case is equally uncertworthy.

Both the majority and the dissent in *International Woodworkers* engaged in dicta concerning whether 42 U.S.C. § 1988 authorizes expert witness fee awards in other situations, with the majority stating that it does not. That issue, however, was not before the court. For all of the case's broader dicta, the court does not decide whether, for example, a successful plaintiff may recover expert witness fees under § 1988. Indeed, given that (as the *International Woodworkers* dissent points out) every circuit allows recovery of costs of litigation under § 1988, it must be expected that the Fifth Circuit, when directly confronted with the issue, will follow suit. Thus, even were the dicta of *International Woodworkers* presented in Champion's Petition for Certiorari, that petition would be uncertworthy.

vacated *en banc* on other grounds) in which expert witness fees have been awarded outside the context of a specific statutory authorization.[9]

The theories of the panel decisions in the Third and Eighth Circuits have yet to be reviewed *en banc* and tested against the majority position of the other circuits. In the meantime, the effects of the "split" identified by petitioners are not significant enough to justify certiorari.

III. MOST ATTORNEYS WILL AVOID ANY PROBLEMS WITH TAXATION OF COSTS BY OBTAINING PRIOR COURT APPROVAL OF EXPERT WITNESSES

The significance of the "split" over expert witness fees under 28 U.S.C. § 1920(3) is further diminished by the fact that in a well-planned case (whatever the circuit), the issue should never come up. In 1978, Congress adopted 28 U.S.C. § 1920(6), which provides:

[9] *Nebraska Public Power District v. Austin Power, Inc.*, 773 F.2d 960, 975 (8th Cir. 1985); *Nemmers v. Dubuque*, 764 F.2d 502, 506-7 (8th Cir. 1985); *Paschall v. Kansas City Star*, 695 F.2d 322 (8th Cir. 1982), *rev'd en banc*, 727 F.2d 692 (8th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 222, 83 L.Ed.2d 152 (1985) (reversing the liability finding and vacating the award of costs without discussion); *Coleman v. City of Omaha*, 714 F.2d 804, 809 (8th Cir. 1983); *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201, 205 (3rd Cir. 1981); *Sack v. Carnegie Mellon University*, 106 F.R.D. 561, 564 (W.D. Pa. 1985); *Dekro v. Stern Bros. & Co.*, 571 F. Supp. 97, 107 (W.D. Mo. 1983); *Fahey v. Carty*, 102 F.R.D. 751, 753 (D.N.J. 1983). In addition, the Third and Eighth Circuits contain two cases involving enforcement of the civil rights laws and attorney fee awards under 42 U.S.C. § 1988 in which the courts awarded expert witness fees under 28 U.S.C. § 1920 without directly tying that award to the statutory authorization or Congressional directives of § 1988. *See Commonwealth of Pennsylvania v. O'Neill*, 431 F. Supp. 700, 713 (E.D. Pa. 1977); *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958 (E.D. Pa. 1980). Two additional cases involved remands for consideration of awards, one case where fees were granted and one where they were denied. *Hiegel v. Hill*, 771 F.2d 358, 360 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 800, 88 L.Ed.2d 776 (1986); *Crues v. KFC Corporation*, 768 F.2d 230, 234 (8th Cir. 1986).

A judge or clerk of any court of the United States may tax as costs the following:

(6) Compensation of court appointed experts . . .[10]

Under 28 U.S.C. § 1920(6) and Fed. R. Evid. 706, the trial judge may, at the request of a party or at his or her own volition, appoint expert witnesses whom he or she believes to be essential to the case, including expert witnesses nominated by one of the parties, and may tax the compensation of that expert witness as a cost.

Court appointment of a witness nominated by one of the parties can and has been used to establish a statutory basis for later taxation of that witness's compensation as costs. *See United States Marshal's Service v. Means*, 741 F.2d 1053, 1057-58 (8th Cir. 1984). This is also done, on occasion, under the rubric of the Court's "inherent power" to tax expert witness fees through prior approval. *See Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274-75 (1st Cir. 1982); *Cagle v. Cox*, 87 F.R.D. 467, 471-72 (E.D. Va. 1980); *Pizarro-de Ramirez v. Grecomar Shipping Agency*, 82 F.R.D. 327 (D. P.R. 1976) (dicta); *Quetel v. Querrand*, 278 F. Supp. 341 (D. V.I. 1968) (dicta).

Thus through 28 U.S.C. § 1920(6), a party can find the explicit statutory authorization that is needed to tax expert witness fees as costs.

The criteria of approving an expert witness under § 1920(6) and the Eighth and Third Circuits' tests for awarding expert witness fees outside statutory authority are effectively the same—the witness must be essential to the case. The sole distinction is that for an attorney to use the authorization of § 1920(6), he or she must plan ahead.

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[10] Congress obviously used the word "compensation" to distinguish this payment from the "witness fees" authorized by § 1920(3) and set as to amount by § 1821.

Assuming that attorneys plan ahead before hiring expensive experts, all of the cases that might have existed under the "split" will be resolved under 28 U.S.C. § 1920(6). The "split" in the circuits thus becomes important only for the practitioner who forgets to seek prior court approval. Certiorari is not needed in such a situation.

IV. THERE IS NO POLICY GROUND FOR GRANTING CERTIORARI

Finally, Petitioners argue that public policy requires that this Court grant certiorari and reverse the court of appeals, so that antitrust plaintiffs will be deterred from bringing suits they may lose. *See* Petn at 13-18. This plea for certiorari is misplaced.

First, petitioners carefully ignore the fact that the federal antitrust laws already contain a section defining under what circumstances attorneys' fees and costs may be recovered in an antitrust action. *See* 15 U.S.C. § 15. This statute does *not* allow recovery of expert witness fees, even for a prevailing plaintiff. *See Trans World Airlines Inc. v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971), *rev'd on other grounds sub nom. Hughes Tool Co. v. TWA*, 409 U.S. 363 (1973), and cases cited therein.

Second, the fees and costs provisions of the antitrust laws are a decision made by Congress to encourage plaintiffs and thus discourage anti-competitive behavior. *See, e.g., Knutson v. Daily Review, Inc.*, 479 F.Supp. 1263, 1267 (N.D. Cal. 1979). Petitioners' argument that certiorari should be granted to deter plaintiffs by making them liable for expert witness fees is no more than a demand that this Court overturn congressionally-established policy on antitrust law.

Finally, because the law against award of expert witness fees under the antitrust laws is so clear, petitioners' public policy argument must paint with much broader brush, and ask this Court to massively revise 28 U.S.C.

§ 1920 and hold that in *all cases* expert witness fees are recoverable as costs. Petitioners argue, in effect, that certiorari should be granted to make a major revision in the American rule on attorneys' fees and costs. This Court has repeatedly held, however, that if such a revision is to be made, it must be made by Congress.

As the *en banc* Fifth Circuit recognized, under the American Rule, except where authorized by Congress or by the three narrow exceptions of *Aleyska, supra* (common fund, willful disobedience, or bad faith), all litigants must bear their own costs of litigation. Here although petitioners devote a large portion of the petition to allegations that petitioner's suit was unfounded, the jury found that the suit was brought in good faith. There is, further, no willful disobedience or common fund involved here. Accordingly, absent a major revision of the American Rule, the Fifth Circuit was correct.

This Court has consistently rejected pleas to depart from this rule. *See Summit Valley Industries, Inc. v. Local 112*, 456 U.S. 717, 721 (1982) (refusing to expand NLRA § 303 to allow recovery of attorneys' fees); *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116, 128-31 (1973) (no award of attorneys' fees under 40 U.S.C. § 207b(a), issues properly addressed by Congress); *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719-20 (1966) (absent specific statutory language awarding fees, none will be awarded under 15 U.S.C. §§ 1116, 1117).

Congress has set the public policies concerning the award of expert witness fees. If petitioners have a plea, it is to Congress for statutory amendments, not to this Court for certiorari.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

DATED this 22nd day of September, 1986.

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